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IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1953.

No. 460

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Petitioner.

vs.

BEN C. DAVENPORT, HARRY A. HAMMIL AND DAILEY BROTHERS CIRCUS, a partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

BEN C. DAVENPORT, HARRY A. HAMMIL AND DAILEY BROTHERS CIRCUS, a partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on June 26, 1953, and the order denying the petition for rehearing in said cause entered on August 11, 1953.

Opinions Below.

The District Court for the Central District of Iowa rendered two written opinions, reported at 94 F. Supp. 83 and 95 F. Supp. 469, dealing with the proper venue for this action. The findings of fact and conclusions of law of the District Court for the Western District of Texas, Austin Division, are unreported, and that court rendered no written opinion on the merits. The opinion of the majority of the Court of Appeals for the Fifth Circuit is reported at 205 F. (2d) 589. Judge Strum did not file a dissenting opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 26, 1953 and a petition for rehearing was duly filed thereafter and denied on August 11, 1953. This petition is filed within ninety days from the denial of said petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and 28 U. S. C. § 2101 (c).

Question Presented.

The circus haulage contracts in evidence in this case provide for the hauling of trains wholly composed of cars owned by the circus, loaded by it with a heterogeneous mixture of wild animals, circus impedimentia and circus employee personnel and moved according to unique routing and scheduling specified by the circus.

Does a railroad become a common carrier of circuses by entering into such individual and special contracts from time to time and filing them with the Interstate Commerce Commission?

Rules Involved.

In its decision, the Court of Appeals relied heavily upon petitioner's compliance with Rule 63, Tariff Circular 20, of the Interstate Commerce Commission and a comparison of that rule with a similar rule applicable to motor vehicles for its determination that petitioner was a common carrier. The texts of these two rules, together with a significant earlier version of Rule 63, appear in Appendix A, *infra*.

Statement.

Petitioner brought this action to recover $31,349.16, being the amount it paid in settlement of a claim under the Federal Employers' Liability Act (45 U.S.C. § 51, et seq.). The claim arose out of an injury to one of petitioner's employees, Chester Hugunin, caused by a defect in a railroad car belonging to respondents and moving over petitioner's line. Respondents' liability was predicated upon the provisions of a contract under which the car in question was being transported (R. 2-17; 31-41). Respondents' answers questioned both the validity and petitioner's construction of this contract (R. 17-28; 41-45).

Respondents are a partnership consisting of Harry A. Hammil and Ben C. Davenport (R. 130), doing business as Dailey Brothers Circus and operating a road show or circus, traveling in twenty-five railroad cars owned by Lone Star Circus Properties and leased to respondents. The show traveled from its winter quarters at Gonzales, Texas, northward to Canada. From there it re-entered the United States in August of 1950, intending to play various towns in the states of Michigan and Wisconsin. In furtherance of this intention, respondents

negotiated a contract at Chicago, Illinois, dated July 20, 1950, providing for the hauling of respondents' circus train over petitioner's lines between August 10th and August 26th, 1950, (R. 130). This contract is reproduced at pages 8 through 14 of the record. The provisions of this contract material to the determination of this case (Sections 1, 3 and 6) are reproduced in Appendix B, *infra*. Section 1 recites the mutual understanding of the parties that the petitioner was not a common carrier of circuses, and that the contract was executed by petitioner as a special carrier only. Insofar as is material, section 3 provided that respondents would maintain their equipment in good condition and provide it with all devices required by law. Section 6 provided that the employees of the railroad should be deemed to be the employees of the circus while engaged in the employment contemplated by the contract. It also provided that respondents would indemnify petitioner for any liability to any person for injury or damage arising from any cause whatsoever.

The only testimony concerning negotiations for haulage contracts was that of respondents Davenport and Hammil. Davenport testified that he knew of two railroads who would not accept circus trains, but could not say whether or not petitioner had ever solicited circus business, (R. 78). He further testified that every railroad requires a separate contract for the haulage of circus trains, and that all railroads used substantially the same form of contract (R. 80-81). Rate contracts are individually made for a stipulated price set up by the railroads, with a minimum charge for a 50-mile run (R. 72-73). The routing of circus trains is especially arranged, and railroads usually do not like

to accept circus contracts unless they can arrange for 8 or 10 stops during the course of a haul over a given line. The routing is determined by the circus on the basis of its opinion as to where the show would draw an audience (R. 71). Respondent Davenport stated that circuses would sign any kind of a contract to get these cars hauled over the railroad line (R. 80).

An examination of the contract shows that it provides for the haulage of a train consisting of designated cars between two points with the privilege of stopping in transit at points designated in the contract. It also provides for track storage of the cars, and for special spotting of the so-called "Treasurer's car". It further provides for a very definite schedule, and usually for midnight departures (R. 8-14).

Eleven similar contracts were introduced in evidence, all of which were identical in form with the contract here except that they covered the shipment of different circuses between different points at different times. One of these contracts had been filed with the Michigan Public Service Commission and ten of them had been filed with the Wisconsin Public Service Commission. Some of them, in addition, had been filed with the Interstate Commerce Commission. Those filed with the Interstate Commerce Commission bore in part the following language (R. 108-122):

> "Issued under authority of Rule 63, Tariff Circular 20, Interstate Commerce Commission."

Pursuant to this contract, respondents' circus train moved over petitioner's line from Ishpeming, Michigan, and, on August 16, 1950 at about 9 o'clock in the morning, entered Antigo, Wisconsin. One of petitioner's employees, Chester Hugunin, acting in the course of his

employment as a switchman, climbed car No. 83, one of the cars contained in respondents' train, and fell when the grabiron located on the roof thereof came loose because it was insecurely attached. A visual inspection by Chester Hugunin did not, and could not, reveal the fact that this grabiron was insecurely fastened to the car (R. 130-132). The circus train was inspected by petitioner at Green Bay, Wisconsin, just prior to its movement to Antigo, at which time two inspectors examined it from the ground and one from the top, none of whom noted any defect in car No. 83 (R. 125).

Hugunin asserted a claim for personal injuries arising out of this accident against the petitioner under the Federal Employers' Liability Act (R. 48). Believing itself protected by respondents under the terms of the special carrier agreement, petitioner gave notice of liability over and tendered defense of such claim to respondents, who wholly failed and refused to accept defense thereof and flatly denied liability (R. 49).

After instituting this suit for declaratory judgment as to the liability of respondents under the contract, petitioner settled Hugunin's claim on March 24, 1952, by paying to him and for his use and benefit the aggregate sum of Thirty-one Thousand Three Hundred Forty-nine and 16/100 Dollars ($31,349.16) (R. 48). By supplemental complaint petitioner then sought recovery of this amount from respondents, jointly and severally (R. 31). It was stipulated that the liability of petitioner to its employee, Chester Hugunin, was clear and that a defense to his claim on the merits would have been unavailing. It was further stipulated that this settlement was a reasonable and prudent compromise made in good faith,

and that the settlement paid to Hugunin was just, fair and reasonable (R. 49).

At the conclusion of the trial, the court dismissed the action (R. 148) on the grounds that Section 6 of the contract was inapplicable to Hugunin's claim, and that, if it were, the contract was void as an attempt by a common carrier to avoid its liability (R. 138-147).

Since the case was tried without a jury, the court made the following findings of fact, pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure, relating to petitioner's status as a common carrier of respondents' circus (R. 132-138):

> "13. Chicago and North Western Railway Company is a common carrier by rail of freight and passengers for hire, domiciled in the State of Wisconsin, and maintaining lines and services in the states of Michigan, Wisconsin and other states, conducting its operations in both interstate and intrastate commerce.
>
> * * * * *
>
> 20. At the time the contract declared upon was negotiated and executed by the parties, neither Chicago and North Western Railway nor its affiliate railroad offered any alternative contract for transportation of the circus rolling stock, personnel and property.
>
> * * * * *
>
> 21. Total consideration for transportation under the contract, exclusive of federal taxes, was the sum of $12,625.00. According to the only evidence given on the point, these transportation charges were made at levels resulting in a profit to the railroad, and plaintiff offered no evidence to the effect that in fact, these rates were reduced, or that same failed to result in a profit.

22. The evidence shows that the various railroads with which the defendant circus has dealt generally solicit the business of transporting the circus train. The contract was filed with the Public Service Commission of Wisconsin.

23. So far as was shown, both the Chicago and North Western Railway and its affiliate railroad hold themselves out to perform the service of transporting circus trains, using the railroad's engines, tracks, facilities and crews, and, in the State of Wisconsin alone, during the years 1949 and 1950, as evidenced by filed tariffs, transported some eleven circus outfits over its lines in that state.

* * * * *

32. It appears that tariffs covering the movement of the circus train, as well as tariffs covering movements of other shows, carnivals and circuses, were filed by plaintiff railroad with the Public Service Commission of the State of Wisconsin."

In an opinion written by Judge Rives, concurred in by Judge Holmes, the Court of Appeals for the Fifth Circuit upheld petitioner's contention that the validity of the subject contract was determined by federal law. While the opinion did not directly construe the contract, it did indicate that the provision that the railroad's employees should be deemed the respondent's employees while working on the circus train could make the indeminfication provisions of the contract applicable to payments on account of injuries suffered by the railroad's employee. The opinion then concluded that the contract was not an attempt to escape liability under the Federal Employers' Liability Act or the Safety Appliance Act, but held that the contract was void because petitioner was a common carrier with respect to respondents' circus. It reached this conclusion because it felt that the trial court had made a finding of fact that the railroad

was actually operating as a common carrier and also because the contract in question had been filed with the Interstate Commerce Commission pursuant to Rule 63 of Tariff Circular 20. Judge Strum dissented without opinion. Subsequently, rehearing was denied by a divided court.

Specification Of Errors Relied On.

The Court of Appeals erred:

1. In holding that petitioner was a common carrier of privately owned circus trains at the time of the execution and performance of the contract herein involved.

2. In holding that the indemnity provisions contained in said contract were void and against public policy.

3. In failing to hold that since petitioner was not acting as a common carrier, but merely as a special carrier, it could validly contract specially for this movement and for a warranty of fitness of the equipment of the respondents involved herein.

4. In failing to hold that the claim arising as a result of the injuries sustained by Hugunin was covered by section 6 of the special carrier agreement.

5. In failing to hold that by maintaining the grab-iron on car 83 in a defective condition, the respondents breached the covenant of warranty contained in Section 3 of the contract of July 20, 1950.

6. In affirming the judgment of the District Court for the Western District of Texas.

Reasons for Granting the Writ.

1. Prior to the decision in this case, the United States Courts of Appeals uniformly held that a railroad was not a common carrier of circus trains composed of cars owned by the circus and moving pursuant to a special contract which provided for an individualized schedule, *Sasinowski* v. *Boston & Maine R. R. Co.,* 74 F. (2d) 628 (C.A. 1st, 1935); *M'Cree* v. *Davis,* 280 Fed. 959 (C.A. 6th, 1922); *Clough* v. *Grand Trunk Western Ry. Co.,* 155 Fed. 81 (C.A. 6th, 1907); *Wilson* v. *Atlantic Coast Line R. Co.,* 129 Fed. 744 (N.D. Ga., 1904) *aff'd* 133 Fed. 1022 (C.A. 5th, 1904), *cert. den* 198 U.S. 585; and *Chicago, M. & St. P. R. Co.* v. *Wallace,* 66 Fed. 506 (C.A. 7th, 1895). Although the majority opinion in this case indicates that Judges Holmes and Rives were fully cognizant thereof, they attempted to distinguish these precedents on three grounds: (1) the trial court's finding of fact that petitioner was a carrier of circus property and soliciting such employment; (2) the decision in *Bernardi Greater Shows* v. *Boston & Maine R.R. Co.,* 86 N. H. 146, 165 Atl. 124 (1933) which simply passed on an issue raised by the pleadings in a preliminary stage of the case, and (3) Rule 63 of the Interstate Commerce Commission's Tariff Circular 20 (R. 171-184). None of the foregoing are valid reasons for a different result.

The trial court made no finding of fact that petitioner held itself out as a common carrier of circus trains. Findings 13, 20, 21, 22 and 23, and 32 contain everything which bears upon petitioner's status as a common carrier (R. 133-138).

It is true that finding No. 13 states that petitioner's general business is that of a common carrier. This is undisputed; it is, however, settled law that a common

carrier becomes a private carrier when it ventures beyond the scope of its public undertaking, *Santa Fe P. & P. R. Co.* v. *Grant Bros. Construction Co.*, 228 U.S. 177, and cases there cited. This is what petitioner contends occurred here.

Finding No. 20 is that petitioner offered no alternative contract to respondents for the transportation of circus rolling stock, personnel and property. That also is true. However, in *Sasinowski* v. *Boston & Maine R.R. Co.*, 74 F. (2d) 628 (C.A. 1st, 1935), the court considered the effect of a recital in the contract that the circus was given the option of having its property hauled by the railroad as a common carrier. The presence of that clause was construed as a possible indication that the railroad was in fact a common carrier of circuses, merely seeking to limit its liability pursuant to Section 20 of the Interstate Commerce Act (49 U. S. C. 20). The court held that the carrier in that case was not a common carrier of circuses because the option referred to in the contract was the choice of having the component parts of the circus shipped by regular freight and passenger service under the tariffs and conditions applicable to each part respectively, not a higher rate for the transportation of the train as a unit.

Clearly, the Court of Appeals in the *Sasinowski* case held that the presence of alternative rates for hauling of circus trains as a unit, differing in the scope of the liability of the carrier, indicated common carrier status. Finding 20 is that such alternatives were not available in this case. To draw an inference of common carrier status from this fact is in direct conflict with the *Sasinowski* case as to the significance of alternative rates.

Finding No. 21 was that the charges for the haulage resulted in a profit to the railroad and that there was no evidence of reduced rates. This finding has no relationship to common carrier status. The level of revenue is not significant, (See paragraphs 2 and 3, *infra*); the question involved is the scope of the railroad's public undertaking.

Findings 22, 23, and 32 state that various railroads solicited the transporting of respondents' train, and that petitioner held itself out to perform the service of hauling circus trains. What other railroads do is of no significance, whatever, as to the scope of petitioner's undertaking, and the finding that petitioner holds itself out to perform the service of hauling circus trains is of no significance since it does not show the manner of such holding out, i.e., whether by negotiation on an individual basis or a general undertaking to carry (See paragraph 2, *infra* for the significance of this distinction). These findings contain statements that petitioner filed this and other contracts with the Public Service Commission of Wisconsin and with the Interstate Commerce Commission. * * * These contracts are the only written evidence of petitioner's holding out; the only other testimony was that of respondent Davenport, who testified that he did not know whether or not the petitioner generally solicited circus business (R. 78). A finding of common carrier status upon the basis of filing the contracts with the Commission is in direct conflict

*** The District Court mistakenly characterizes these documents as tariffs. However, examination shows that none of them is a general tariff, but, on the contrary, each was a specific, individually executed, special contract (R. 108-120).

with *M'Cree* v. *Davis*, 280 Fed. 959 (C.A. 6th, 1922), where the circus haulage contract was executed pursuant to a general freight tariff, filed with the Interstate Commerce Commission by the carrier.

The significance given Rule 63, Tariff Circular 20, of the Interstate Commerce Commission is also in conflict with the holding in the *M'Cree* case, since the failure of the Commission to refuse permission to file indicates that the Commission believed it had jurisdicton. Moreover, Rule 63 was first promulgated as part of Tariff Circular 18 on March 18, 1907, and the *Clough*, *M'Cree* and *Sasinowski* cases were all decided since its issuance. Obviously, the tariff in the *M'Cree* case was promulgated pursuant to it. Also, the *Sasinowski* case arose out of the same accident as the *Bernardi Greater Shows* litigation, and, in the latter, the second opinion construed Rule 63 as authorizing these contracts. Therefore, this ruling of the Court of Appeals for the Fifth Circuit in the case at bar is in direct conflict with the aforementioned cases on this point as well.

Likewise the reliance of the Court of Appeals for the Fifth Circuit upon the first *Bernardi Greater Shows* v. *Boston & Maine R. R. Co.* opinion is in direct conflict with the *Sasinowski* case. In that case, the *Bernardi* opinion was the principal authority relied upon by the plaintiff to impose liability upon the railroad, and was specifically rejected by the Court of Appeals for the First Circuit

It has been shown that none of the reasons advanced by Judge Rives constitute a valid basis for distinguishing the holdings of the First, Sixth and Seventh Circuits that railroads are not common carriers of circuses. As a result it is apparent that there is a square conflict be-

tween the majority opinion in this case, and the unanimous holdings of the Court of Appeals for three other circuits as to the status of railroads hauling circuses under special contract. This conflict should be settled by this Court.

2. The evidence of petitioner's holding itself out as a carrier of circuses consisted of eleven individual circus contracts (R. 108-122). In deviating from the prior Federal decisions and holding that petitioner was a common carrier of circuses, the Court of Appeals for the Fifth Circuit ignored the qualitative rules as to the kind of holding out which establishes common carrier status as laid down in the applicable decisions of this Court.

In the early case of *Gracie v. Palmer*, 8 Wheat. 605, 633 (21 U. S.), this Court, in applying the law of common carriers to the construction of a ship charter, noted that there was a distinction between one who rented his vehicle to others for their use in the transportation of goods, and one who used his equipment himself for the transportation of others' goods. This Court further held that it made no difference whether the owner of the ship furnished the crew and equipment, but that the true test was whether the goods to be hauled were turned over to the possession and control of the carrier. In the instant case, the train was loaded by the circus, accompanied by its personnel and moved on a schedule drawn up by the circus to suit its own business needs. By the terms of the contract, the railroad furnished only an engine, caboose, train crew and the right of passage over its tracks (R. 8). (This was also true of the other contracts.) At no time did the possession of the circus property ever pass to the railroad. Hence, under the definition of the *Gracie* case, no common carrier liability could result.

In *Propeller Niagara* v. *Cordes*, 21 How. (62 U.S.) 7 (1858); *The Lady Pike*, 21 Wal. (88 U.S.) 1, 14 (1874), and *Santa Fe Railway* v. *Grant Bros.*, 228 U.S. 177 (1908) this Court defined a common carrier. With respect to the nature of the holding out, each opinion noted that there must be a holding out to the public, generally, as being willing to accept the goods of anyone, indiscriminately, for transportation.

In *Tap Line Cases*, 234 U. S. 1 (1913), this Court reviewed a decree of the Commerce Court, setting aside a decision of the Interstate Commerce Commission that the railroads involved were plant facilities and not common carriers entitled to divisions of rates. In that case, this Court stated that the principle applicable in determining common carrier status was the extent to which the public has a right to demand service of a railroad, not the extent to which it is actually used.

Under these principles, it is clear that petitioner was not a common carrier. The record herein does not show the filing of general tariffs, the publication of an offer to carry any circus which might apply for transportation, or any general holding out which a member of the public might accept. The facts shown in the record certainly would not obligate petitioner to haul any circus which might apply; hence, under the foregoing cases, petitioner would not be a common carrier of circuses.

Probably the most conclusive evidence of conflict with the applicable decisions of this Court is the fact that in *Baltimore & O. Ry. Co.* v. *Voight*, 176 U. S. 498, 513 (1899), this Court determined the validity of a special carrier contract between a railroad and an express company. In holding that a railroad could act as a special

carrier, the Court relied upon a number of authorities as stating the correct law. Among them were *Coup* v. *Wabash etc. R. Co.*, 56 Mich. 111, 22 N.W. 215; *Robertson* v. *Old Colony Railroad Company*, 156 Mass. 525, 31 N. E. 650, and *Wilson* v. *Atlantic Coast Line R. Co.*, 129 Fed. 774 (D. C. Ga., 1904) *aff'd* 133 Fed. 1022 (C.A. 5th, 1904) *cert. den.* 198 U. S. 585, all of which held that a railroad was not obligated to receive and transport circus trains as a common carrier.

3. The decision of the Court of Appeals for the Fifth Circuit is manifestly erroneous, in addition to being in conflict with the decisions in other courts and the applicable decisions of this Court, because it ignores both the normal scope of a railroad's common carrier undertaking and the factors necessary to broaden the scope of such undertaking.

In addition to the Federal cases heretofore cited, most authorities hold that a railroad is not a common carrier of circuses, *Robertson* v. *Old Colony Railroad Co.*, 156 Mass. 525, 31 N. E. 650; *Coup* v. *Wabash etc. Ry. Co.*, 56 Mich. 111, 22 N. W. 215; *Forespaugh* v. *Delaware etc. Ry. Co.*, 128 Pa. 217, 18 Atl. 503; *Chicago etc. R. Co.* v. *Hamler*, 215 Ill. 525, 74 N. E. 705; *Cleveland etc. R. Co.* v. *Henry*, 170 Ind. 94, 83 N. E. 710; *Sabol* v. *Chicago and N. W. Ry. Co.*, 225 Mich. 548, 238 N. W. 281, and *Sager* v. *Northern Pacific Ry. Co.*, 166 Fed. 526 (D. C. Minn., 1908), and *Bernardi Greater Shows* v. *Boston & M. R. R. Co.*, 89 N. H. 490, 1 A. (2d) 360.

All of these cases refer to the fact that the shipments involved in a circus train constitute a mixture of wild animals, which are not normally carried as part of a railroad's business, persons and property lumped to-

gether in one train moving on an irregular schedule determined by the shipper. They also regard it as significant that a contract and not a bill of lading is used, that the loading and unloading of the train is performed by personnel of the circus, that special spotting arrangements are required, that the personnel-carrying cars are used as permanent living quarters, and that the care of the property while in transit remains in the hands of the circus personnel.

The rationale of these cases is simple and sound. It is simply that where the type of haulage involved differs from the railroad's normal operations, common carrier liability should not be imposed in the absence of a specific general undertaking to perform that type of service.

The unique nature of circus haulage was recognized in *Coma* v. *St. Louis-San Francisco Ry. Co.*, 74 I. C. C. 400 (1922). There a circus owners' association had complained that the practices of the railway company in handling circus trains constituted an unjust discrimination as prohibited by the Interstate Commerce Act. The Commission held that, even if it had jurisdiction, there was no violation of the Act, since the handling of circus trains was so much different than the handling of ordinary railroad traffic. In view of this recognized difference and the extra precautions recognized by the Commission as necessary in the handling of such traffic, a greater degree of selectivity must of necessity be permitted the carrier in determining which circuses it will haul. This will not be possible if circus train haulage is held to be a common carrier activity.

Four decisions were cited by respondents in the Court of Appeals against the foregoing proposition with respect to circuses. In *Southern Pacific Company* v. *State of*

Arizona, 249 U. S. 472, this Court merely held that a state commission had the power to regulate the intra-state transportation of circus outfits. Nothing in the rationale of that decision required a determination that the railroad was a common carrier since the issue involved was the general scope of state police power as applied to the regulation of any business. This was also true of *A. T. & S. F. R. Co.* v. *State* (Okla.) 206 Pac. 252. In *Maucher* v. *Chicago, I. & P. R. Co.*, 100 Neb. 237, 159 N. W. 422, the court actually held that the release contained in the plaintiff's contract of employment with the circus would be invalid because wanton or gross negligence on the part of the carrier was involved. As the concurring opinion specifically pointed out, the language of the court with respect with the common carrier status of the railroad was purely gratuitious dicta.

The fourth case, *Bernardi Greater Shows, Inc.* v. *Boston & Maine R. R. Co.*, 86 N. H. 146, 165 Atl. 124, was the case principally relied upon in this case by the Court of Appeals for the Fifth Circuit. In addition to the fact that it was specifically disapproved in *Sasinowski* v. *Boston & Maine R. R. Co.*, 74 F. (2d) 628 (C.A. 1st, 1935), it was reversed in a later decision of the same court, 89 N. H. 490, 1 Atl. (2d) 360. The first *Bernardi* opinion resulted from a submission to the New Hampshire Supreme Court of a certified question prior to the trial of the case. The New Hampshire court recognized the Federal authorities, but held that the option given in the contract of shipping the show at higher rates under a tariff, thereby securing common carrier liability from the railroad, was sufficient to indicate a holding out as a common carrier of circuses. This, not the facts relied upon in this case by the Court of Appeals for the Fifth Circuit, was the situation to which

the language quoted by the Court of Appeals was applicable. The Court quite properly viewed this alternative as an attempt to limit liability under Section 20 of the Interstate Commerce Act. In the second *Bernardi* case opinion, the Court carefully pointed out that the first *Bernardi* case was decided only upon the complaint and contract. In reversing its former holding, it relied primarily on the fact that the tariffs, classifications, and rules were subsequently shown to be those applicable to the various items of property moving on regularly scheduled freight trains and to passengers moving on passenger trains. Therefore, the holding in the first *Bernardi* case is not authority for the position taken below by the Court of Appeals for the Fifth Circuit, since the first *Bernardi* case assumes a filed general tariff, and the second *Bernardi* case held filing of the contract was not sufficient.

The basic question for determination is the nature of the holding out by the railroad company. In addition to the decisions of this Court, heretofore cited (par. 2, *supra*), it is well-recognized that the holding out must be a manifestation of willingness to carry property for all persons indifferently. In other words, it must be a general statement by the railroad that it will haul upon stated terms and conditions any circus that is tendered to it. See *Larson* v. *Aetna Life Ins. Co.*, 19 Wash. (2d) 601, 143 P. (2d) 850; *Campbell River Mills Co.* v. *Chicago, M. & St. P. R. Co.*, 42 F. (2d) 775 (W. D. Wash. 1930); *People* v. *Duntley*, 217 Cal. 150, 17 P. (2d) 715; *Rutledge Co-op. Ass'n* v. *Baughman*, 138 Atl. 29, 153 Md. 297; *Jackson Architectural Iron Works* v. *Huntbut*, 158 N. Y. 34, 52 N. E. 665; *Hissem* v. *Guran*, 112 Ohio St. 59, 146 N. E. 808; *State ex rel Board*

of Railroad Com'rs v. *Rosenstein,* 217 Iowa 985, 252 N.W. 251 and *Jacksonville Bus Line Co.* v. *Watson,* 349 Ill. App. 462 (mem., 1935). This is also the rule announced in the two *Bernardi* opinions. The difference between the *Bernardi* cases was that, in the first case, the court was under the impression that the Boston & Maine R. R. Co. published general tariffs for the movement of circus trains as a unit. While the failure to publish such general tariffs is not proof of a lack of common carrier status, it is an indication thereof, (*United States* v. *Interstate Commerce Commission,* 288 Fed. 649, 654 (C. A. D. C., 1923).

The record before this Court is devoid of any proof that petitioner filed any general tariffs, rules, regulations or conditions governing the carriage of circus trains, either with the Interstate Commerce Commission or any regulatory body. The record is devoid of proof that the petitioner ever held itself out to the public generally as being willing to haul the circus trains of any show which applied to it for transportation. On the contrary, the record clearly indicates that each circus transaction was handled by petitioner separately (R. 72-73, 109-122). The finding of fact that petitioner solicited such business and held itself out as being willing to haul circus trains is of no significance since the evidence on which it was based was uncontroverted, *Fritz v. Jarecki,* 189 F. (2d) 445, 448 (C.A. 7th, 1951); *Orvis* v. *Higgins,* 180 F. (2d) 537, 539 (C.A. 2nd, 1950); and *Campbell Soup Co.* v. *Wentz,* 172 F. (2d) 80, 82 (C.A. 3rd, 1949). Moreover, it failed to recognize that the nature of the holding out was simply that the petitioner was willing to negotiate, individually, for the carriage of each train.

The Court of Appeals for the Fifth Circuit primarily relies upon Rule 63 of the Interstate Commerce Com-

mission Tariff Circular No. 20 (R. 182-4), and the decisions of the Interstate Commerce Commission in *Chappelle* v. *Louisville & N. R. R. Co.*, 19 I.C.C. 56, 56, 19 I.C.C. 456, and *Coma* v. *St. L. S. F. R. Co.*, 74 I.C.C. 400. For a number of reasons, this rule and compliance with it are not indicative of common carrier status.

In the first place this identical rule was urged as having the effect of indicating that the railroad involved was a common carrier in *Bernardi Greater Shows* v. *Boston & M. R. R. Co.*, 89 N. H. 490, 1 A. (2d) 360. In that case the Court noted that the evidence was unquestioned that the defendant had filed its special contracts with the Commission for many years pursuant to that rule, but construed the rule as recognizing such special contracts. Moreover, in *M'Cree* v. *Davis*, 280 Fed. 959 (C.A. 6th, 1922), the contracts were executed pursuant to a freight tariff filed with the Commission.

In the *Coma case* (74 I.C.C. 400), the railroad moved to dismiss for lack of jurisdiction on the grounds that it was acting as a private carrier of circus trains. The Commission expressly declined to decide that question, holding that the acts complained of with respect to circuses were not in violation of the Act even if the Commission had jurisdiction over circus haulage. Subsequent to the Commission cases cited by the Court of Appeals, the Commission clearly indicated its opinion that the haulage of circus trains was not a common carrier activity on the part of the railroads. The case of *Petroleum Rail Shippers Assn.* v. *Alton & S. R.*, 243 I.C.C. 589, 620 (1941) involved the rates charged for bulk shipments of petroleum. The complaining shippers' association offered an exhibit setting forth the charges for the transportation of circus trains on the theory that they were comparable

rates. The presiding Commissioner sustained an objection to the admissibility of such evidence on the ground that it was not comparable since the railroad transported circus trains as a private carrier and not as common carrier. On a petition to reconsider, this ruling was affirmed by the whole Commission.

Another indication that the Commission does not believe that the haulage of circus trains is a common carrier activity is contained in a comparison of the present and former versions of Rule 63. When Rule 63 was first issued in 1907 as a part of Tariff Circular 18, it contained a preliminary statement that the Interstate Commerce Act applies to the transportation of circuses. This statement was omitted from the later version of this same rule, reflecting the later views of the Commissioner when actually confronted with this issue quasi-judicially.

The Court of Appeals in the instant case was influenced by the similarity between the language of the Interstate Commerce Commission rule applicable to the haulage of circus trains by railroads to that of the rule applicable to such haulage by motor carriers. (See Appendix A, *infra*, for the texts of these rules.) The only difference is that the recital of the applicability of the Interstate Commerce Act contained in the motor carriers' rule is omitted from the railroad carriers' rule. From this, the court draws the inference that, since the Act is specifically declared applicable to motor carriers and the rest of the language is the same, the Commission must have concluded that it was applicable to railroads. What the Court of Appeals failed to consider, however, was that the language concerning the applicability of the Act was present in the earlier version of the railroad rule (Rule 63, Tariff Cir-

cular 18), and was subsequently stricken (Rule 63, Tariff Circular 20). The court also failed to consider the fact that the scope of the Act is different with respect to railroad carriers and motor carriers. The railroad rule, omitting the recital of applicability of the act, was promulgated under Part I of the Act which is applicable to common carriers by railroad, 49 U.S.C. § 1. The motor carrier rule, containing the recital of applicability, was promulgated under part II of the Interstate Commerce Act which is applicable to both common carriers and contract carriers by motor vehicle 49 U.S.C. § 204. It is clear that if this contract were one for carriage by motor vehicle, the carrier would be a contract carrier as defined in Section 203(15) of that Act, not a common carrier. Viewed comparatively and in the light of its history, it is clear that the text of Rule 63 and the decisions involving it indicate that railroads are not common carriers of circuses.

The Court of Appeals found it unnecessary to decide the question as to whether Hugunin's injuries were within the scope of the contract. It indicated, however, that it believed that they were (R. 176). Such a conclusion is amply supported by the record. It is well known that a contract must be read as a whole (3 *Williston, Contracts* (Rev. Ed.) § 618; 2 *Restatement, Contracts* § 235). With respect to this rule, the *Restatement of Contracts* provides that a sentence or paragraph of dubious meaning taken by itself may be made clear by other parts of the writing, and even words having a clear meaning themselves may be given a different meaning because of their context (*Restatement, Contracts,* § 235 *Comment on Clause* (*C*), p. 322). Applying this rule to Section 6 of the contract, it is clear that had an employee of the circus been

injured in this manner and brought claim against the railroad the provisions of Section 6 would have been applicable. The effect of the provision that the railroad's employees, including Hugunin, shall be deemed employees of the circus while working on the train is to place Hugunin in the same position.

Moreover, independently of Section 6, petitioner was entitled to recover under the contract for its payments to Hugunin. By section 3 of the contract, respondents warranted that all the equipment, including car No. 83, would be provided with all devices required by law and kept in the condition required by law during the period of the contract. A firmly affixed grabiron is required by the Safety Appliance Act (45 U.S.C. § 4). In *Sartoris* v. *Utah Construction Co.*, 21 F. (2d) 1 (C.A. 9th, 1927) and *City of Lake View* v. *MacRitchie*, 134 Ill. 203 (1890) similar language to Section 3 was construed as constituting a warranty. Damages for injuries to a third person resulting from a breach of warranty are recoverable. *London Guarantee & Accident Co.* v. *Strait Scale Co.*, 322 Mo. 502, 15 S.W. (2d) 766; *Boston Woven Hose Co.* v. *Kendall*, 178 Mass. 232, 59 N.E. 657 and *Mowbray* v. *Merryweather*, 2 Q. B. 640 (1895).

4. The status of railroads with respect to circus train haulage is a question of general importance on which the law should be definitely settled by this Court. The necessity of the continued availability of the present form of railroad transportation for circus trains is clearly indicated by the testimony of respondent Davenport that circuses will agree to anything to persuade railroads to haul them (R. 78). The Interstate Commerce Commission distinctly recognized that low transportation costs are necessary to various traveling theatrical companies because, if

forced to move at regular tariff rates, continued operation would be impossible for many of them, *In the matter of Party Rate Tickets,* 12 I.C.C. 96, 101 (1907). At the same time the special hazards in the transportation of circus coaches, which are often old, more likely to develop defects, and routed in such a way that less rigorous inspection can be given them during the show season, were recognized in *Coma* v. *St. Louis-San Francisco Railway Co.*, 74 I.C.C. 400 (1922). Under these circumstances the chances of injury from latent defects are high. A rule which prevents a railroad from passing on such risks to the circus, for whose benefit the contract is made, would result in either burdening the entire circus industry with a high rate of carriage, because of an amortizing factor for such risks, or, since a railroad may not be compelled to carry a circus, the refusal of railroads to haul special trains composed of cars owned by circuses. It is a matter of common knowledge that circuses depend upon this type of transportation, and such a refusal by railroads would result in a major disruption in the circus industry.

This decision is of unusual importance since it comes from the Fifth Circuit, embracing most of the southern states. It is a matter of common knowledge that during the summer most circuses are extremely transient, going into winter quarters in the South at the close of their season. Under these circumstances, it would be difficult, if not impossible, to bring suit against a circus on one of these contracts in any place other than a state lying within the Fifth Circuit. (See the opinions of the District Court for the Southern District of Iowa in this case, 94 F. Supp. 83 and 95 F. Supp. 469.) To permit this clearly erroneous decision by the Court of Appeals to stand under these circumstances would be most unjust.

As a matter of fact the decision of the Court of Appeals in this case has received wide publicity throughout the railroad industry (*Traffic World*, Vol. 92, No. 15, p. 60), and petitioner has received inquiries as to whether the question would be pursued in this forum. At least one of these inquiries stated that if it was not, the inquiring railroad would be forced to reconsider the desirability of handling circus trains in the present manner.

Moreover, the need for uniformity of rule in all matters where interstate commerce is concerned is so well recognized that this Court has held that Federal common law is to be applied, rather than state law under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, (*Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92; *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U. S. 359; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239). This need for uniformity of law is present here. In the face of the clear conflict created by the decision in this case, the desired uniformity can only be obtained by a decision of this Court.

Conclusion.

The question presented in this case is one upon which the decisions of the other Courts of Appeals are unanimous and in conflict with the majority opinion in this case. The determination of the Court of Appeals for the Fifth Circuit that petitioner held itself out as a common carrier ignored the rules laid down in the decisions of this Court and was manifestly erroneous. As a result of this decision, a revision of railroad policy with respect to the transportation of circus trains is highly probable, working to the detriment of both industries. Moreover,

the need for uniformity of the law in this field is well recognized. In view of the conclusion reached by the Court of Appeals in this case, such uniformity can be provided only through a decision of this Court on the question presented by this petition. For these reasons petitioner respectfully submits that a writ of certiorari should issue to review the decision of the United States Court of Appeals in this case.

Respectfully submitted,

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APPENDIX A.

Applicable Rules of the Interstate Commerce Commision.

Interstate Commerce Commission Tariff Circular No. 18 Issued March 18, 1907.

"63. Transportation of Circus Outfits (Issued March 18, 1907).—The act to regulate commerce, as amended June 29, 1906, applies to the transportation of circuses and other show outfits, but the Commission recognizes the peculiar nature of this traffic and the difficulty of establishing rates thereon in advance of shipper's requests describing the character and volume of the traffic offered, and has therefore entered a general order authorizing carriers to establish rates on circuses and other show outfits by tariff, to become effective one day after filing thereof with the Commission, and relieving them from the duty of posting such tariffs in their stations. Such tariff may consist of a proper title page reading 'As per copy of contract attached' and to it may be attached a copy of the contract under which the circus is moved. As far as practicable, general rules or regulations governing the fixing of such rates should be regularly published and filed."

Code of Federal Regulations (1949), Title 49—Transportation, Chapter 1—I.C.C.

As applicable to freight service (railroads):

"Sec. 141.63. *Transportation of Circus Outfits.*

"Rates for specified movements of circuses and other show outfits may be established on not less than 1 day's notice to the commission. Such tariffs must bear reference to this rule and must publish the charges specifically, showing the number and kind of cars moved, or may consist of a proper title page reading 'as per copy of con-

tract attached, and to it may be attached a copy of the contract under which the circus moved. Tariffs containing such rates need not be posted at stations. As far as practicable, general rules or regulations governing the fixing of such rates should be regularly published, posted and filed upon statutory notice."

As applicable to motor carrier service (trucks), the same regulation is made, the first sentence, however, reading as follows:

"Sec. 145.63. *Transportation of circus outfits.*

"The Interstate Commerce Act applies to the transportation of circuses and other show outfits, but the Commission recognizes the peculiar nature of this traffic and the difficulty of establishing rates thereon in advance of shippers' request describing the character and volume of the traffic ordered, * * *."

APPENDIX B.

Excerpts From Contract of July 20, 1953 Between Chicago and North Western Railway Company and Dailey Brothers Circus.

"1. That it is mutually understood and agreed that the Railroad is not a common carrier of circuses or show outfits, or cars and equipment carrying the same, and has never held itself out as such; and that it enters into this agreement as a Special carrier only, and not as a common carrier.

* * *

3. All equipment presented by party of the second part for transportation hereunder shall be in proper, good and sufficient condition and shall be provided with all devices required by law and party of the second part shall keep the same in such condition during the continuance of this contract, and it shall contain no powder, fireworks, or explosives, or any animals to be transported in violation of any Federal, State or Muncipal laws, rules, regulations or requirements. Party of the first part shall have the right to inspect at any time all or any of such equipment or contents and exclude the same from the benefit of this contract; but this provision shall not be held to cast upon the party of the first part the duty to so inspect nor any liability for failure to do so or to report defects.

* * *

6. The liability of the respective parties hereto as to all persons and property transported or to be transported in pursuance of this agreement, or coming upon the premises of the railroad company in connection therewith or otherwise in connection with the business of party of the second part, shall be governed by the provisions hereof, and in that behalf it is agreed that this contract is not made with the said railway company as a carrier, either common or special, of the said persons or property of any thereof (the compensation to be paid by said party

of the second part being wholly inadequate consideration for any such undertaking), but as a hirer to the party of the second part of the motive power and equipment and of men to operate the same, and of the right to use the road and tracks of the said railway company, to the extent necessary in the premises, and that the conductors, engineers, trainmen, and other officials, agents or employees furnished by the said railroad company hereunder shall, for all purposes of this contract, while engaged in such employment, be deemed to be the servants of the party of the second part, and to be operating said motive power and equipment under the orders, direction and control of the party of the second part; and party of the second part hereby fully releases and discharges the said railway company from, and agrees that the said railway company shall not be liable to the said party of the second prt, nor to any person or persons, for any injury or damage which may happen to any persons, cars or property to be or which may be transported hereunder, or otherwise may be upon said train or upon the railway company's premises, which may be caused by any defect in the railroad tracks or premises of the party of the first part of unsuitableness thereof for such transportation, or by the negligence of said conductors, engineers, trainmen, or other officials, agents or employees of the railway company, or any or either of them, or arising from any cause whatsoever. Party of the second part hereby further covenants and agrees to protect, indemnify and forever hold free and harmless the said party of the first part from any and all liability, loss, judgments, costs and expenses whatsoever, arising from or in connection with claims or suits for damages on account of any such injury or damage."